

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PLYMOUTH TOWER ASSOCIATES	:	DETERMINATION
AND MACARTHUR TOWERS	:	
DEVELOPMENT CO., INC. ¹	:	
for Revision of a Determination or for Refund	:	
of Tax on Gains Derived from Certain Real	:	
Property Transfers under Article 31-B of the	:	
Tax Law.	:	

Petitioners, Plymouth Tower Associates and MacArthur Towers Development Co., Inc., c/o Bay Colony Property Company, Inc., 125 Summer Street, Boston, Massachusetts 02110, filed a petition for revision of a determination or for refund of tax on gains derived from certain real property transfers under Article 31-B of the Tax Law (File No. 804714).

A hearing was held before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on July 26, 1990 at 1:15 P.M., with all briefs submitted by November 2, 1990. Petitioner appeared by Kronish, Lieb, Weiner & Hellman (Michael C. DeLisa, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Kenneth J. Schultz, Esq., of counsel).

ISSUE

Whether the penalty asserted against petitioner for failure to timely file tax returns and pay tax due under Tax Law Article 31-B in connection with the conversion of certain premises to cooperative ownership should be abated.

¹MacArthur Towers Development Co., Inc. has been added as a petitioner in this matter by consent of the parties (see Finding of Fact "2"). Both entities are referred to in this determination collectively as "petitioner".

FINDINGS OF FACT

On July 8, 1987, following an audit, the Division of Taxation ("Division") issued to petitioner Plymouth Tower Associates, a Notice of Determination of Tax Due under Gains Tax Law Article 31-B ("gains tax") indicating tax, penalty and interest due of \$1,515,751.00, a credit for payment of \$1,422,192.00 and a balance due of \$93,559.00. This notice pertained to an audit of 340 East 93rd Street Corporation, a cooperative housing corporation to which petitioner MacArthur Towers Development Co., Inc., as sponsor under a cooperative conversion plan, had transferred certain real property located at 340 East 93rd Street, New York, New York.

Prior to the transfer of the real property to the cooperative housing corporation, Plymouth Tower Associates had transferred the building to MacArthur Towers Development Co., Inc. in exchange for other real property. MacArthur Towers Development Co., Inc. and the partners of Plymouth Tower Associates are subsidiaries of Bay Colony Property Company, Inc.

The aforementioned transfer of real property from petitioner, as sponsor, to the corporation (the "realty transfer") occurred on May 13, 1986 pursuant to an Agreement of Sale dated November 15, 1984 between Plymouth Tower Associates and 340 East 93rd Street Corporation. This realty transfer was made in connection with a plan of cooperative conversion accepted by the Attorney General's office.

On April 25, 1986, requisite transferor and transferee questionnaires were submitted to the Division by petitioner's attorneys in connection with the then-pending transfer. Petitioner requested by these filings a Statement of No Tax Due on the realty transfer. Accompanying the questionnaires were a Gains Tax Calculation Worksheet, an Original Purchase Price Schedule with a Schedule of Capitalized Costs, a Schedule of Sold Units which indicated that 317 units had been sold, representing 221,143 shares of stock in the cooperative housing corporation, and the Agreement of Sale dated November 15, 1984. The Gains Tax Calculation indicated that since the transfer was from a sponsor to a cooperative corporation, no gains tax was due. The calculation further stated that "Tax will be paid on transfers from Coop Corporation to

individual unit purchasers."

On May 6, 1986 petitioner requested, through its attorneys, a tentative assessment of gains tax due. Included with the request was a transferor questionnaire and a transferee questionnaire covering the units sold and a Calculation Worksheet which showed Anticipated Gain of \$14,037,762.40, Anticipated Tax of \$1,403,776.24 and Anticipated Tax Per Share of \$5.5451.

On May 12, 1986, the Division requested that petitioner provide information on 13 different items. The letter stated that the Division's 20-day period for issuing a tentative assessment on the transaction would not commence until the information requested was received. The letter further stated that the tax was due on the date of transfer and, should any transfers occur prior to the payment of tax, the Division would assess penalty and interest.

On the same May 13, 1986 date as the realty transfer, petitioner transferred 96 individual apartment units to various purchasers. By letter dated May 14, 1986, petitioner forwarded to the Division a check in the amount of \$466,065.66, representing payment of the gains tax due as computed by petitioner on the units transferred on May 13, 1986. The payment exceeded the amount of the gains tax due by \$102,707.00, which represented tax paid on 28 units that were not transferred on May 13, 1986. It had been anticipated by petitioner that these units would be transferred on the date of the realty transfer but, in fact, they were transferred on a later date due to various circumstances.

Following the realty transfer, further correspondence passed between the Division and petitioner's attorneys in an attempt to clarify certain information contained in the documents filed by petitioner relating to the cooperative conversion. The letters are summarized as follows:

(a) On May 29, 1986, petitioner forwarded to the Division a revised gains tax calculation relating to the transfer between the sponsor and the cooperative corporation, a revised original purchase price schedule and a revised schedule of capitalized costs with the supporting documentation requested by the Division. It also addressed 4 of the 13 questions contained in

the Division's letter of May 12, 1986.

(b) In a letter dated June 20, 1986, the Division requested information and documentation relating to five items; three of the requests related to information contained in petitioner's letter of May 29, 1986 and two of the requests were the same as two requests contained in the Division's May 12, 1986 letter but not answered by petitioner. The letter repeated the statements that the 20-day period for issuing a tentative assessment would not commence until the information requested was supplied and that the tax was due on the date of transfer. The letter further stated that the Division had no record of any tax payments.

(c) On June 23, 1986, the Division requested transferee questionnaires for 11 units. The letter repeated the statement that the Division's 20-day period for issuing a tentative assessment would not commence until the information requested was received.

(d) On July 24, 1986, petitioner responded to the requests for information contained in the Division's letter of June 20, 1986. Petitioner's letter also contained a schedule of units sold, five transferee questionnaires and four subscription agreements.

(e) On August 7, 1986, the Division requested that petitioner provide transferee questionnaires and/or subscription agreements for approximately 40 units that had been sold between May 13, 1986 and July 17, 1986. This letter restated that the Division's 20-day period for issuing a tentative assessment would not commence until the information requested was provided and that the tax was due on the date of transfer. The letter further stated that petitioner's "method of unit submission is very confusing and time consuming" and requested that future unit submissions be completed by including the transferee and transferor questionnaires and the subscription agreements.

(f) On October 8, 1986, petitioner forwarded to the Division transferor and transferee questionnaires for five new units sold. The letter requested a tentative assessment for each unit.

(g) Petitioner forwarded to the Division, on October 8, 1986, some of the documentation requested in the Division's letter of August 7, 1986, and indicated that the remainder was being gathered and would be forwarded as soon as possible. Accompanying the letter was a check in

the amount of \$926,856.78, representing payment of the tax due on 216 units sold, with an allocation of 167,149 shares. In computing the tax due, petitioner used the same tax per share figure (\$5.5451) as it used to compute the tax due on its earlier payment made May 14, 1986.

(h) On November 12, 1986, petitioner supplied additional information to the Division and requested that the individual tentative assessments be issued.

(i) On December 2, 1986, the Division notified petitioner that a field audit of the transfers involving the 340 East 93rd Street property would be conducted on December 29-31, 1986.

(j) On January 27, 1987 petitioner's attorneys requested that the Division waive the penalty and interest penalty asserted in the Statement of Proposed Audit dated December 31, 1986. In his letter, Mr. William Jay Lippman, Esq., of the law firm of Kronish, Lieb, Weiner & Hellman, made the following statements with regard to the issue of the crediting of the initial payment made in May 1986:

(i) "By letter dated June 20, 1986, Mr. Godfrey (Real Property Gains Tax Auditor) requested more information and stated that his office had no record of the May 14 payment. We immediately brought the May 14 payment to his attention."

(ii) "As previously stated, the May 14 payment was not properly credited until after we received Mr. Godfrey's June 20 letter stating that his office had no record of it."

Mr. Lippman was present at the hearing but did not testify.

During the period May 14, 1986 through October 8, 1986, petitioner transferred 244 individual apartment units. Transferor and transferee questionnaires were not filed or were late filed. However, petitioner did make the Division aware of the transfers through its correspondence.

The Notice of Determination of Tax Due under Gains Tax Law issued on July 8, 1987 was based upon the audit of the cooperative conversion involving the property located at 340 East 93rd Street. The auditor determined that of the 358 apartment units comprising the cooperative conversion, 340 units had been sold and were therefore subject to the gains tax.

Accordingly, the Division determined tax due on such transfers in the aggregate amount of \$1,403,199.00, plus interest. To arrive at the amount of gains tax due, the auditor computed a tax per share figure of \$5.905. Petitioner was credited with \$1,392.923.00 in gains tax paid, leaving additional tax due of \$10,276.00. Penalty was also imposed based upon petitioner's failure to timely file returns and timely pay the tax due in connection with the transfers that occurred after the realty transfer. Penalty was computed to the date of the second payment, October 9, 1986.

Mr. Robert Meyer, vice-president, treasurer and chief financial officer of MacArthur Towers Development Co., Inc., testified at the hearing. During 1986, Mr. Meyer was the assistant treasurer of MacArthur responsible for the accounting functions relating to the 340 East 93rd Street project.

Mr. Meyer testified that the Division did not issue petitioner a tentative assessment and that the information requested by the Division could have significantly affected the tax calculations estimated by petitioner. Mr. Meyer further testified that the Division did not confirm receipt of the May 14, 1986 payment until December 1986 when the audit was being conducted. According to Mr. Meyer, petitioner notified the Division of the closings between May 13, 1986 and October 8, 1986 but did not pay any tax because it was not obligated to make payments until the Division issued the tentative assessments. In addition, payment was not made because petitioner was concerned about continuing to pay tax when it did not know whether its initial payment had been credited. The second gains tax payment was made in 1986 because, according to Mr. Meyer, petitioner was aware it owed some amount of tax and wished to stop the accrual of interest.

Petitioner does not contest the tax and interest due on audit. In fact, petitioner has paid the tax and interest as shown on the Notice of Determination of Tax Due. It is likewise uncontested that gains tax was not timely paid on the transfers that occurred between May 13, 1986 and October 8, 1986. Petitioner, however, does contest the imposition of the penalty for late payment concerning the unit transfers which occurred between May 1986 and October

1986. The amount of penalty at issue is \$98,897.00.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contests the imposition of penalty and seeks abatement thereof on the basis that its delay in paying the tax was caused by the Division. Petitioner states that it requested a tentative assessment prior to any closings of the unit transfers. It timely made its initial payment which was not credited by the Division. The Division continued to request information of petitioner, but even after the information was provided, the Division failed to issue the tentative assessments. Furthermore, petitioner advised the Division of the additional closings while working with the Division to determine the proper amount of tax due.

According to petitioner, the facts and circumstances indicate that petitioner intended to pay the tax but was prevented from doing so by the Division.

The Division of Taxation argues, by contrast, that petitioner was late in filing questionnaires and also that necessary information requested of petitioner in connection therewith was late in being submitted.

CONCLUSIONS OF LAW

A. Tax Law § 1446.2(a) provides as follows:

"Any transferor failing to file a return or to pay any tax within the time required by this article shall be subject to a penalty of ten per centum of the amount of tax due plus an interest penalty of two per centum of such amount for each month of delay or fraction thereof after the expiration of the first month after such return was required to be filed or such tax became due, such interest penalty shall not exceed twenty-five per centum in the aggregate. If the tax commission determines that such failure or delay was due to reasonable cause and not due to willful neglect, it shall remit, abate or waive all of such penalty and such interest penalty." (Emphasis added.)

B. Pursuant to Tax Law § 1447.1, the Commissioner of Taxation and Finance is required to make available forms to be filed by both the transferee and transferor, on which forms said parties shall provide relevant information with respect to a given transfer of property including, inter alia, information as to the original purchase price for the property, the consideration paid for any capital improvements, the consideration for the transfer, the amount of any brokerage fees, etc. Pursuant to Tax Law § 1447.2, these forms (transferor and transferee questionnaires) are used in the Department of Taxation and Finance's determination of a tentative assessment of the amount of gains tax due pursuant to the pre-transfer audit procedures called for under said section. Said section provides, specifically, as follows:

"When the transferor and transferee shall have furnished pertinent affidavits and any other information necessary to determine such tentative assessment at least twenty days prior to the date of transfer, such department shall provide the transferor and transferee with a statement of tentative assessment of the amount of tax, or a statement that no tax is due, at or prior to the date of closing and, if such affidavits and information are furnished within such period, such department shall provide such statement as soon as practicable, but not later than twenty days from the date such affidavits and other information have been furnished to the tax commission." (Emphasis added.)

C. Tax Law § 1442 provides, specifically in the case of transfers pursuant to a cooperative or condominium plan, that the date of transfer shall be deemed to be the date on which each cooperative or condominium unit is transferred. Said section also specifically provides that gains tax is to be paid by the transferor to the Commissioner of Taxation and Finance on the date of each such transfer.

D. Here, it is undisputed that payments of gains tax due were not made on the dates of

the transfers between May 14, 1986 and October 9, 1986 and that transferor and transferee questionnaires required pursuant to the pre-transfer audit procedures (see Tax Law § 1447) were, for the most part, late filed or not filed at all. Either of these failures properly results in the imposition of penalty pursuant to Tax Law § 1446.2(a), waivable only if petitioner can establish that the late or non-filing or the late payment was the result of reasonable cause and not willful neglect.

E. As set forth above, Tax Law § 1447.2 provides that if the parties to a transfer file the required documents (a transferor and transferee questionnaire and any other information necessary for the Division to determine gains tax liability) at least 20 days prior to a transfer, the Division of Taxation shall issue a tentative assessment of the tax due within 20 days thereafter. Tax Law § 1442 states that the tax is due on the date of the transfer. Under this statutory scheme a transferor and transferee who make the required filings at least 20 days prior to the transfer are informed by the tentative assessment of how much tax to pay on the date of transfer. On the other hand, parties who do not comply with the 20-day pre-transfer filing are still obligated to pay the tax due on the date of transfer, but do not necessarily have a tentative assessment to tell them how much tax to pay (Matter of Baumstein, Borrok, et al - Tenants-In-Common, Tax Appeals Tribunal, April 20, 1989).

F. Petitioner would assert that the penalty imposed herein should be cancelled on the basis of the fact that the Division did not issue to petitioner tentative assessment and returns pursuant to Tax Law § 1447.2 and/or properly credit petitioner for its initial gains tax payment. Although petitioner did notify the Division of its transfers during the period that penalty is assessed, it has not explained why its transferor and transferee questionnaires were either late filed or not filed at all during this period.

G. On balance, petitioner has not established that its failure to timely file returns and pay tax due was the result of reasonable cause such as would support abatement of the penalty imposed. Petitioner's late and/or non-filings alone would be sufficient to trigger a portion of the penalty and there has been no excuse advanced for such failure to timely file. In addition,

petitioner's assertions that the Division is at fault for its failure to issue tentative assessments and failure to credit petitioner's initial gains tax payment are unavailing. The lack of tentative assessments being issued by the Division appears to have resulted largely, if not completely, from petitioner's failure to have complied with the pre-transfer audit procedures. More specifically, not only did petitioner fail to timely file but also apparently failed to provide all necessary information as required (Tax Law § 1447.2). Petitioner was able to compute the per share tax allocation within fifty cents of the per share amount ultimately determined upon audit. Furthermore, petitioner made both its initial payment and the later payment without benefit of a tentative assessment. Petitioner was aware of its gains tax liability and chose not to pay it on a timely basis. Finally, petitioner's claim that it was hesitant to make the second payment because the Division did not confirm the initial payment until the audit was conducted is unpersuasive. According to petitioner's representatives, upon being notified in a letter dated June 20, 1986 that the Division had no record of the initial payment, the representatives immediately brought the payment to the Division's attention. From this point in time to the end of the year when the audit was conducted, there is no mention in the numerous pieces of correspondence of the initial payment. It would appear that either the issue was resolved when the payment was brought to the attention of the Division or petitioner ignored the issue until the audit was conducted. Neither situation explains petitioner's own failures to have timely filed and submitted necessary information and to timely pay the gains tax liability it knew was due (see, Matter of Baumstein, Borrok, et al - Tenants-in-Common, supra).

H. The petition of Plymouth Tower Associates and MacArthur Towers Development Co., Inc., is hereby denied and the Notice of Determination of Tax Due dated July 8, 1987 is sustained.

DATED: Troy, New York
January 30, 1992

ADMINISTRATIVE LAW JUDGE

